United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

No. 74-1100 74-1100

United States Court of Appeals

For the Second Circuit

JOEL BREAKSTONE
PLAINTIFF-APPELLANT

v.

JOHNSON STATE COLLEGE, et al.
DEFENDANT-APPELLEES

B

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

APPENDIX TO BRIEF OF APPELLANT

RICHARD S. KOHN
AMERICAN CIVIL LIBERTIES
UNION OF VERMONT, INC.
5 State Street
Montpelier, Vermont

DUNCAN KILMARTIN
REXFORD, KILMARTIN & CHIMILESKI
22 Third Street
Newport, Vermont

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INDEX TO APPENDIX

RELEVANT DOCKET ENTRIES

1971 March 11	Complaint filed
March 11	Hearing on plaintiff's Motion for T.R.O.; college given 10 days in which to hold hearing
April 8	Answer of defendant Barnet with Motion to Dismiss filed
April 19	Answer of defendants Craig and Monticello filed
May 4	Hearing on defendant Barnet's Motion to dismiss
June 1	Opinion and Order denying Barnet's motion to dismiss filed
November 3	Plaintiff files requests to inspect and copy documents
1972 February 29	Plaintiff's motion for Order of Production of documents
March 23	Hearing on plaintiff's Motion to order production
May 22	Plaintiff's motion to compel discovery against Defendant Craig filed
July 11	Hearing on motion Ordered: all discovery to be completed by August 30, 1972
1973 January 29	Pre-trial conference held Plaintiff moves to amend complaint to add claim to libel Decision reserved
February 23	Pre-trial conference order filed
1973 April 11	Trial by court before Hon. Albert Coffrin begins

1973	Amendment to complaint adding count of libel allowed. Answer amended by Mr. Cleary
April 19	Trial concluded Plaintiff moves to introduce further testimony on damages Motion granted Plaintiff rests: defendants rest; Evidence is closed Defendants move for directed verdict Taken under advisement
May 7	Memorandum of law filed on behalf of Johnson State College; Craig and Monticello
May 8	Defendant Barnet's memorandum of law and proposed findings of fact filed.
May 23	Plaintiff's Memorandum of Law in opposition to Motions to dismiss filed
September 12	Findings of fact, opinion and order filed by court — judgement for defendants
October 12	Plaintiff's Notice of Appeal filed
November 16	Plaintiff's Motion for Extension of time to file transcript Order extending time for filing and docketing record on appeal to January 10, 1974
1974 January 7	Filed transcript of hearing held 3/11/71 Transcript of trial April 11-13, 1973 Mailed record on appeal to U.S. Court of Appeals

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Joel Breakstone

v.

Johnson State College, William Craig, individually and as President of Johnson State College, Ralph Monticello, individually and as Dean of Students of Johnson State College, Theodore Barnet, individually and as State's Attorney for Lamoille County

Civil Action
File No. 6226

FINDINGS OF FACT,
OPINION AND ORDER

COFFRIN, District Judge.

On March 11, 1971 plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983 seeking injunctive and declaratory relief. Jurisdiction was invoked pursuant to 28 U.S.C. § 1343(3) and declaratory relief was requested pursuant to 28 U.S.C. §§ 2201, 2202. At the time the complaint was filed the plaintiff, a student, had been suspended from Johnson State College in Johnson, Vermont. Plaintiff alleged that the College had denied him due process in connection with his suspension and also that defendants Craig, Monticello and Barnet collectively had conspired to deny him due process as guaranteed by the Fourteenth Amendment of the United States Constitution. It was further alleged by the plaintiff that defendants Craig, Monti-

cello and Barnet individually acted in a manner which deprived him of his due process rights.

Plaintiff sought reinstatement as a student at Johnson State College as well as compensatory damages in the amount of $500 and punitive damages of $1,000 from the individual defendants. At a hearing on plaintiff's motion for a Temporary Restraining Order on March 11, 1971 the late Chief Judge Leddy suggested that the College grant plaintiff a hearing with reference to his suspension. Adopting this suggestion, the College's Judicial System promptly provided plaintiff with a hearing which led to his reinstatement as a student. Thus, the request for a temporary restraining order was not acted upon.

A motion filed by defendant Barnet to dismiss the plaintiff's complaint for failure to state a claim upon which relief could be granted was denied by Judge Leddy by Opinion and Order filed June 1, 1971.

On January 29, 1973 plaintiff moved to amend his complaint to allege that a letter dated February 11, 1971 written by defendant Barnet to defendant Craig contained information which was "false, malicious, defamatory and libelous," was "calculated to cause injury to the plaintiff" and as a consequence plaintiff, then a student in good standing, was suspended from the College. Plaintiff also moved to increase the ad damnum to $8,135 actual damages and $10,000 exemplary damages. Plaintiff's motion to amend was granted at the time of trial and defendant Barnet orally denied these allegations but raised no affirmative defense thereto and we agreed to hear the libel claim under the doctrine of pendant jurisdiction. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1956).

Pursuant to Rule 52(a), Fed. R. Civ. P., the Court makes the following findings of fact:

1. At all times material to this action the plaintiff was a freshman at defendant Johnson State College, Johnson, Vermont; defendant William Craig was President of Johnson State College; defendant Ralph Monticello was Dean of Students of the College and defendant Theodore Barnet was State's Attor-

ney of Lamoille County, the county in which the College is located.

2. The plaintiff entered Johnson State College in January, 1970.

3. During the summer of 1970, the plaintiff worked as a general counselor, softball coach and instructor in radio and electronics at Camp Robin Hood, Center Ossipee, New Hampshire.

4. At the conclusion of the camping season one of the campers gave the plaintiff several (as many as 8) model rocket ship engines. These were paper covered cylinders approximately 2½ to 3½" in diameter containing a hard packed sparkling powder. The plaintiff brought these cylinders with him when he returned to Johnson State College, storing them in a desk drawer in the room which he shared with David Lawrence, his college roommate.

5. Sometime in early December of 1970 plaintiff emptied the contents of some or all of these rocket engines into a larger cylinder. After the powder had been packed into the larger cylinder, it was sealed with wax and scotch taped and a fuse, obtained from one David Hawkins, was placed in one end. The plaintiff was assisted in these endeavors by his roommate and one or two friends, but it was plaintiff who initiated these actions. Moreover, ownership of the "device" as finally assembled was in the plaintiff.

6. After assembling the device, plaintiff, accompanied by the students who assisted him in the construction, took it into the woods near the College and repeatedly attempted to detonate it by lighting the fuse with matches. When these efforts proved to be unsuccessful, the device was taken back to the plaintiff's room and, after removing the fuse, was placed in the desk drawer of David Lawrence.

7. On Friday, December 11, 1970, a few days after the unsuccessful attempt to explode the device, David Hawkins, in a somewhat inebriated condition, informed Robert Dunn, a resident student adviser at the College, that the plaintiff had a "bomb" in his room. Dunn reported this to Leonard Leene,

another resident student adviser and, after the two advisers discussed the matter with a Mrs. Marjorie Smith, the dormitory resident director, defendant Monticello was apprised of the alleged bomb.

8. Defendant Monticello consulted with defendant Craig, who was attending a meeting at Castleton State College in Castleton, Vermont, by telephone concerning this matter and shortly thereafter defendant Monticello, together with resident advisers Dunn and Leene, searched plaintiff's room and discovered the device in a drawer in Lawrence's desk. The device was confiscated by defendant Monticello.

9. Plaintiff was present in his room and although he gave permission for the search, he was only partially awake. Later that evening plaintiff and his roommate went to Mrs. Smith's room where he located defendant Monticello and demanded the return of the device as their joint property, but plaintiff did all, or virtually all, of the talking. The device was not returned to plaintiff then or at any subsequent time.

10. On Monday, December 14, 1970, Lamoille County law enforcement officials, including members of the Vermont State Police and defendant Barnet, were notified by defendant Monticello of the discovery of the device on the College Campus. The device was delivered to law enforcement officers either simultaneously or shortly thereafter.

11. Prior to reporting the incident to the Lamoille County officials defendant Monticello filed a written report of the incident with the Magistrates of the College Judicial System (see Finding No. 18) summarizing the charge as "manufacture of explosive device, endangering other lives and property." The Magistrates advised, in writing, that the civil authorities should act upon the matter and not "the college court system."

12. On December 15, 1970 officers of the Vermont State Police as well as certain federal law enforcement officers interviewed on the College Campus witnesses, who had knowledge of, or who had played some part in, the incident. Those interviewed included defendant Monticello, Resident Advisers Leene and Dunn, Peter A. Foote, who was President of the College

Student Council, David Hawkins and the plaintiff. Recorded statements, which were transcribed in due course, were taken from all of those interviewed with the exception of Foote. The witnesses met with, and gave their statements to, the law enforcement officials alone with the exception of the plaintiff, who was interviewed with defendant Monticello present at plaintiff's request. According to the plaintiff, his statement to the police was substantially accurate with the exception of answers which he gave to questions concerning whether or not he obtained a fuse for the device when it was being assembled. Those answers were untrue in that he had obtained a fuse but he stated to the State Police that he had not.

13. The Vermont State Police submitted a copy of their report of investigation, including copies of the transcribed statements of the interviewed witnesses, to defendant Barnet. The State Police also made arrangements for an examination of the device by the "State's Laboratory" and their report stated that if necessary the device "will be sent further for identification and the capabilities of the bomb."

14. On or about December 14, 1970, defendant Craig advised plaintiff that if the report received from the laboratory indicated "the device was explosive and harmful to people and property" plaintiff would be dismissed from College.

15. The Christmas recess commenced on December 19, 1970 and extended to January 18, 1971. During this recess the plaintiff was employed full time at the Toll House Inn in Stowe, Vermont, where his remuneration was $60.00 a week plus room, board and a free ski pass. This was permanent employment as opposed to employment which was available only during the vacation period.

16. At the end of the Christmas recess the plaintiff was permitted to return to College with the understanding he could no longer live in Arthur Hall (his dormitory residence at the time he assembled the device) and that he would be suspended from College if the device proved to be of a nature harmful to persons and property.

17. On February 11, 1971 plaintiff was orally advised by de-

fendant Monticello and/or defendant Craig that the State's laboratory report indicated that the device had been determined to contain sufficient explosive material to be dangerous to persons and property. Plaintiff was therefore suspended from the College. At that time defendant Monticello showed plaintiff a letter that defendant Barnet had sent to defendant Craig advising defendant Craig of the potentially harmful capacity of the device. Plaintiff was afforded no hearing at the time of his dismissal or prior thereto by the College Judicial System. Nor had plaintiff, at any time up to the time of his dismissal, requested such a hearing. However, from the date of the incident to the date of suspension, there had been frequent and repeated discussions in person and by telephone between plaintiff and defendants Craig and Monticello concerning the matter including telephone communications initiated by plaintiff virtually every day to defendants Craig and Monticello when plaintiff was working in Stowe during Christmas recess. Plaintiff was well aware of the nature of the charges against him as the result of these discussions and telephone conversations. On February 12, 1971 plaintiff's suspension was confirmed in the form of a letter to him from defendant Monticello.

18. The complaint in this action was filed in this court on behalf of the plaintiff on March 11, 1971 and, as a result of a suggestion by the late Chief Judge Leddy at a hearing on the application for a temporary restraining order, the matter was referred back to the College Judicial System and the "all college court" afforded the plaintiff a hearing on March 19, 1971. As a result of that hearing the plaintiff was reinstated as a student upon condition that he "find housing off campus" and that he "stay out of all dorms for the rest of the semester." Thereafter the plaintiff availed himself of the appeals procedure of the College Judicial System and on March 31, 1971 the appeals court of the College overruled the "all College Court." The appeals court found the plaintiff guilty of being involved in the creation of a potentially dangerous device and, inter alia, ordered the plaintiff to:

"(1) live off campus for the remainder of the academic year and
(2) to obey all rules and regulations of this College understanding that a failure to do so will result in the most severe of sanctions."

19. Following his reinstatement the plaintiff has remained a student in good standing at Johnson State College to the present time.

20. Sometime following his suspension from College plaintiff was charged in the Vermont District Court, Lamoille Circuit, by defendant Barnet with alleged possession of fireworks, to which charge plaintiff pleaded not guilty. Defendant Barnet at plaintiff's arraignment suggested to the court that the appropriate plea to be entered on behalf of the plaintiff would be not guilty by reason of insanity and recommended plaintiff to be not guilty by reason of insanity and recommended plaintiff be committed to the Vermont State Hospital for a thirty day period of observation. This suggestion was rejected by the Court. In April, 1971 the plaintiff was tried by Court, adjudged guilty and assessed a fine. Plaintiff did not appeal the judgment.

21. Defendant Craig became President of Johnson State College in July, 1970 following a long, varied and distinguished career in the field of educational administration with other institutions.

22. In a memo dated August 17, 1970 defendent Craig assigned certain administrative functions to defendant Monticello as Dean of Students which functions included, inter alia, student government, discipline, relations with legal authorities, student affairs and student morale.

23. Despite his memo to defendant Monticello of August 17, defendant Craig believed that the ultimate decision in disciplinary matters rested with the President of the College and he did not consider that the decision to suspend or dismiss a student can be delegated to others but is the sole prerogative of the President. Defendant Craig's position in this regard varied from his predecessor's policy of College administration. The judicial

structure of the College, as well as the college staff and faculty, were aware of Dr. Craig's position with respect to dismissal and suspension of students, and knew that he would not delegate this right to others.

24. The only information or assistance which defendant Craig ever sought or desired from defendant Barnet concerning the incident involving the plaintiff was whether or not the contents of the device would be harmful or lethal to persons or property if exploded.

25. Defendant Barnet wrote letters to defendant Craig on December 21, 1970, January 27, 1971 and two on February 11, 1971. Only one of these letters written on February 11, 1971 contained the information requested by defendant Craig informing him that the explosive device contained a sufficient amount of explosive matter to cause material damage to people or property in its proximity when and if it would have been detonated. The other observations and remarks of defendant Barnet set forth in the several letters concerning the plaintiff or his status at the school, were neither solicited nor given particular weight by defendant Craig.

26. The letters of February 11, 1971 were written by defendant Barnet following a discussion with defendant Craig at the Copley Hospital Auxiliary ball which was held subsequent to the writing of defendant Barnet's letter of January 27, 1971. Defendant Craig did not feel that defendent Barnet's letter of January 27, 1971 was responsive to his request for information concerning the explosive nature of the device and thus requested an appointment with defendant Barnet to obtain further information with regards to the device. At the ball defendant Barnet initiated a conversation with defendant Craig as to why Craig wished an appointment with him. Craig advised him of the reason and the letters of February 11, 1971 were sent by defendant Barnet as the result of this conversation.

27. Defendant Craig was unacquainted with plaintiff prior to December 11, 1970. Thereafter he had several conversations with him, some of which were extended and involved philosophy and ideology but did not specifically encompass plaintiff's political philosophy or beliefs. Insofar as the building of the device was concerned defendant Craig considered plaintiff to have acted without malice, but with poor judgment. In Dr. Craig's opinion, plaintiff's acts showed a lack of respect for other people in the residence hall which created an atmosphere of tension and anxiety. Some members of the faculty and the student body who were upset by the incident relayed these feelings of fear and tension to defendant Craig. Certain members of the College community also advised defendant Craig, who was relatively new to the campus, that plaintiff was considered to be a controversial person and by some to be a "campus radical."

28. Defendant Monticello had been Dean of Students at Johnson State College since July, 1969 which position, broadly speaking, concerned all matters of student life and behavior, other than academic programs. He was directly involved with student discipline and the student disciplinary system.

29. Both defendants Monticello and Craig were involved with the disciplinary aspects of the incident involving the plaintiff and they discussed it frequently. In some instances defendant Monticello was aware that certain persons interested in the matter, including one resident adviser and the resident director, had gone directly to defendant Craig and discussed the incident with him.

30. Defendant Monticello generally concurred with the actions taken by defendant Craig in connection with the incident and plaintiff's participation therein.

31. Defendant Monticello believed that defendant Barnet was of the opinion that the plaintiff should not be allowed to remain in school. He was also generally aware that defendant Barnet was critical of the fact that the school authorities had not contacted the State's Attorney's office of the State Police earlier than was actually done. Monticello understood defendant Barnet felt that this delay had impeded the cause of justice.

32. Defendant Barnet is presently 52 years of age. He graduated from Columbia Law School in 1947 and was admitted to practice in New York in 1948. He never practiced in New York or elsewhere prior to 1966. His occupation was that of a specialist in Middle Eastern carpet wool. He took the Vermont bar exam and was admitted to practice in Vermont in 1966. In 1967 he received an L.L.M. degree from New York University. Defendant Barnet became State's Attorney for Lamoille County in February, 1969, and has functioned in that capacity to the present time. Prior to assuming the duties of his office he took two criminal law courses at New York University. He also attended a five day seminar in Boston in February, 1969 sponsored by the National District Attorneys Association, which covered the functions and duties of the prosecutor.

33. The duties of the State's Attorney as of December 11, 1970 as conceived by defendant Barnet were (1) to screen all charges and complaints brought to him by the police to determine that there was probable cause to go forward with prosecution and (2) to act before the fact by investigating potential or existing criminal activity to insure the "health, safety and welfare of the people in his county."

34. The letters written by defendant Barnet to defendant Craig on December 21, 1970, January 27, 1971 and on February 11, 1971 were unsolicited by defendant Craig. The letters were written by defendant Barnet in his capacity as State's Attorney and not in his private capacity as a citizen of Lamoille County. The recommendations and comments contained in those letters concerning plaintiff were not prompted by any malice on the part of Barnet toward the plaintiff but were motivated by his belief that he had a duty to protect the people of Lamoille County which necessitated imparting his concern to the College authorities. Defendant Barnet was sincere in his belief that plaintiff was potentially dangerous to the community. In writing the letters defendant Barnet recognized that he had no authority over the actions of the College authorities and any implementation of his suggestion would have to be solely at the discretion of the College officials.

35. Defendant Barnet's concern at the time he wrote the various letters to defendant Craig and made the various recommendations contained therein were based not only on information developed as the result of State Police interviews with various persons connected with the incident involving the explosive device, as contained in the report of investigation of the State Police, but also upon information from other sources, some of it hearsay, to the effect that plaintiff was involved in the "drug scene," had placed certain individuals on the campus in fear by his actions, had built or participated in the building of the "explosive device" and had previously expressed thoughts at about the time of the incident involving the Kent State students which indicated a generally low regard for police and the national guard and that plaintiff felt that under certain circumstances and conditions he might be placed in a position where he would be compelled to kill those exercising authority.

36. Defendant Barnet had participated in a forum or discussion at Johnson State College shortly after the Kent State incident which plaintiff attended. At this seminar plaintiff had apparently expressed himself freely. Defendant Barnet did not recall plaintiff specifically at this gathering.

37. Defendant Barnet did recall prosecuting plaintiff on a motor vehicle "defective equipment" charge in April, 1970. He recalled that plaintiff was picked up in or near the driveway leading to a house in which several persons were being "busted" for possession and sale of various drugs.

38. There was no concert of action between defendants or any of them except as was incidental to the relationship of defendant Craig and defendant Monticello as President and Dean of Students of Johnson State College. There was no conspiracy on the part of the defendants or any of them to deprive plaintiff of any of his constitutional rights.

39. There is no credible evidence that plaintiff sustained any financial loss or embarrassment or mental suffering as a result of the events (including his suspension) following the incident involving the explosive device.

40. Plaintiff did complete fewer semester hours than would have been the case had he not been suspended by the College but it is reasonable to assume, based on the testimony as to the degree of his intelligence, that he would have successfully completed all of the courses for which he originally enrolled in January, 1971. There was no evidence, however, to the extent of any financial loss which the plaintiff may have sustained because he did not complete all of the courses for which he enrolled. Nor was there any evidence that with his degree of intelligence he could not have made up such courses as were lost so that he could have graduated on December 1, 1973 as he originally contemplated rather than in June, 1974 as he now contemplates.

OPINION AND ORDER

At the outset we note that defendant Johnson State College is not a "person" within the meaning of 42 U.S.C. § 1983 and therefore, as to it, plaintiff has failed to state a claim upon which relief can be granted. *Moor v. County of Alameda*, —— U.S. ——, 41 U.S.L.W. 4627 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961); *Spampinato v. City of New York*, 311 F.2d 439 (2d Cir. 1962), *cert. denied*, 372 U.S. 980 (1963); *Derby v. University of Wisconsin*, 54 F.R.D. 599 (E.D. Wis. 1972). Accordingly this action is dismissed as to Johnson State College. We do find, however, that the other named defendants were acting under color of state law and thus are within the ambit of Section 1983.

It is apparent that plaintiff's reinstatement at the College after the action taken by the College judicial system has rendered moot plaintiff's request for a temporary restraining order on grounds that he was denied procedural due process with regard to his suspension. *Demby v. Wexler*, 436 F.2d 570 (2d Cir. 1970). Furthermore, plaintiff has continued to matriculate at the College up to and including the present time and expects to graduate in due course. For that reason, there is no necessity to consider whether the permanent injunctive relief which the plaintiff originally sought in this action should be granted.

The issue of compensatory damages for the five week delay between the date of plaintiff's suspension and the date of the action which resulted in his reinstatement is rendered academic by our finding that there was no credible evidence introduced at the hearing of any financial loss to the plaintiff as the result of his suspension. Likewise, there is insufficient credible evidence to conclude that plaintiff suffered embarrassment, mental suffering or humiliation as a result of the alleged deprivation of his rights by defendants. Furthermore, no credible evidence appears that any of the defendants engaged in conduct which was willfully, intentionally or maliciously directed at depriving plaintiff of any of his constitutionally secured rights and thus no award of punitive or exemplary damages is warranted. *United States ex rel. Motley v. Rundle*, 340 F. Supp. 807 (E.D. Pa. 1972); *Sexton v. Gibbs*, 327 F. Supp. 134 (M.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *Cordova v. Chonko*, 315 F. Supp. 953 (N.D. Ohio 1970). However, the nonavailability of compensatory and punitive damages does not foreclose consideration of plaintiff's claim of damages for constitutional deprivations. Whether or not compensatory or punitive damages are present, nominal damages may be recovered in an action brought under Section 1983 because the constitutional rights of a citizen are so valuable that an injury is presumed to flow from the deprivation itself. *Batista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *United States ex rel. Motley v. Rundle, supra; Bradley v. School Board of City of Richmond*, 324 F. Supp. 401 (E.D. Va. 1971); *Wilson v. Prasse*, 325 F. Supp. 9 (W.D. Pa. 1971), *aff'd*, 463 F.2d 109 (3d Cir. 1972); *Sexton v. Gibbs; supra; Cordova v. Chonko, supra; Tracy v. Robbins*, 40 F.R.D. 108 (D.S.C. 1966), *appeal dismissed*, 373 F.2d 13 (4th Cir. 1967); *Washington v. Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966). In this posture, we thus proceed to a consideration of the substantive allegations of plaintiff's action.

There was no concert of action and thus no conspiracy between any of the defendants to deprive plaintiff of his due process rights. *Peterson v. Stanzcak*, 48 F.R.D. 426 (N.D. Ill. 1969).

The evidence is clear that defendants acted as individuals with regard to the actions they took concerning the plaintiff's involvement with the explosive device and far from acting in concert with defendant Barnet, defendant Craig not only did not solicit recommendations from him but when they were volunteered they were not adopted. Craig eventually did suspend the plaintiff, which was a procedure consistently suggested by Barnet but Craig quite independently arrived at the decision (and plaintiff had been so informed) that if the device was determined to have explosive potential the plaintiff would be dismissed. Craig's decision in this regard had been made well in advance of Barnet's recommendation to the same effect. All that Craig desired from Barnet was a report as to the nature of the device and whether or not it was potentially harmful. This was a simple request made to the public official best suited to ascertain and provide the desired information. Apart from that, these defendants were largely in disagreement as to how the situation should be handled by the College and by implication at least Barnet disapproved of the procedures being followed by Craig and Craig disapproved of the opinion and recommendations being advanced by Barnet.

Barnet, who had no connection with the College, could not act as an individual so as to deprive the plaintiff of any procedural rights which might be due him by virtue of his status as a student. Defendants Craig and Monticello, because of the nature of the positions each enjoyed with the College, were required to work closely with one another concerning the incident in which the plaintiff was involved. There was no evidence, however, that they conspired to deprive the plaintiff of any constitutional rights to which he was entitled. If in fact such a deprivation resulted because of the manner in which they handled events resulting from plaintiff's involvement with the explosive device, this was not the result of any conscious attempt on their parts either singly or in concert.

The evidence is quite clear that defendant Monticello made no decisions and took no action which interferred with plaintiff's constitutionally protected rights. Aside from the conspiracy

contention, which we find lacks merit, the gravamen of plaintiff's action against the college officials is that he was denied a hearing prior to his suspension. It is clear that defendant Craig, not defendant Monticello, was the operative individual in this regard.

Having found no liability on the part of defendant Monticello, we proceed to a consideration of defendant Craig's conduct. It was Craig who exercised his authority as College President to suspend plaintiff allegedly in derogation of his rights.

It is essential to recognize that President Craig acted only after the Magistrates of the College court system, an internal college judicial structure, declined to exercise their authority over the matter, believing it instead to be a matter for the civil authorities.

The United States Court of Appeals for the Second Circuit appears to have expressly left open the question whether the suspension of a student from a publicly financed educational institution necessitates application of due process safeguards. *Farrell v. Joel*, 437 F.2d 160, 162 (2d Cir. 1971); *Madera v. Board of Education*, 386 F.2d 778, 784-85 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). However, in this case, largely because the suspension was for an indeterminate period, we deem plaintiff's separation from the College sufficiently analogous to an expulsion to mandate the application of due process standards. *Farrell v. Joel*, *supra*, at 162; *Madera v. Board of Education*, *supra*, at 785. *See also*, *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972); *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *Wright v. Texas Southern University*, 392 F.2d 728 (5th Cir. 1968); *Baker v. Downey City Board of Education*, 307 F. Supp. 517 (E. Cal. 1969); *Stricklin v. Regents of the University of Wisconsin*, 297 F. Supp. 416 (W.D. Wisc. 1969), *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970).

It is uncontroverted that there was no formal adversary hearing granted to plaintiff before his indefinite suspension became

effective on February 12, 1971 but this does not exhaust our inquiry. Unlike the rigid, formalistic rule adopted by the Fifth Circuit Court of Appeals, *see Wright v. Texas Southern University, supra; Dixon v. Alabama State Board of Education, supra*, the Second Circuit has adopted a functional approach with regard to the type of due process hearing which must be afforded a student prior to the deprivation of a significant right. With regard to the flexibility of the due process concept, the Second Circuit indicated in *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom. Sostre v. Oswald*, 464 U.S. 1049 (1972):

> [D]ue process embodies the differing rules of fair play which through the years have become associated with differing types of proceedings. Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. Hannah v. Larche, 363 U.S. 420, 442 80 S. Ct. 1502, 1515, 4 L. Ed.2d 1307 1960. *Id.* at 196.

Fuentes v. Shevin, 407 U.S. 67 (1972), although dealing with a different subject, emphasizes that the object of prior due process notice and hearing is aimed at establishing the validity, or at least the probable validity, of the underlying claim against a person about to be deprived of a property interest. The Supreme Court has consistently held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1949). *See also Fuentes v. Shevin, supra; Boddie v. Connecticut*, 401 U.S. 371 (1971). In school discipline cases the nature of the sanction affects the validity of the procedure used in imposing it. *Farrell v. Joel, supra*, at 162. A suspension for a lengthy interval approaches the more serious of the two extremes of major and minor discipline and thus mandates a

relatively stringent observance of the trappings of due process. However, this position is somewhat tempered by the further instruction in *Farrell v. Joel*, that in determining the necessity for due process protections a legitimate inquiry is whether any "constitutionally required purpose would have been served by more formal procedures." *Farrell v. Joel*, *supra*, at 163; *see also Winnick v. Manning*, *supra*, at 549-50. In the instant case, plaintiff was notified by defendant Craig shortly after the dangerous device was discovered in his room that serious disciplinary action was contemplated against him and plaintiff knew that Craig was the official who could effect his separation from the College.

From his many discussions and telephone conversations with defendants Craig and Monticello, plaintiff was well aware of the nature of the charges against him. In addition if he saw or received a copy of the judicial report filed by Dean Monticello on December 14, 1970 with the College judicial system he was aware of the charges from that source also, although the evidence is silent as to whether that report was made avialable to him.

In *Mullane v. Central Hanover Tr. Co.*, *supra*, the Supreme Court ruled that the notice required by due process "must be such as to convey the required information." *Id.* at 314. We conclude that even though notice of the charge against plaintiff was rather informally communicated to him, it was sufficient to satisfy the requirements of due process. *Tate v. Board of Education of Jonesboro, Ark. Special School District*, 453 F.2d 975 (8th Cir. 1972). *See also Davis v. Ann Arbor Public Schools*, 313 F. Supp. 1217, 1226-27 (E.D. Mich. 1970) where the court ruled that because the student had full knowledge of the reasons for his suspension there was no need for formal notice of the charges against him.

The right to confront and cross-examine witnesses against him, although not of a constitutionally mandated character, *Winnick v. Manning*, *supra*, at 549, is, of course, an indicia of fairness to the student. Here, no beneficial purpose could be served by this safeguard because there was simply no

significant dispute over whether plaintiff possessed this device. Plaintiff never denied that the device was his and defendant Craig was aware of this concession. Thus, to conclude that plaintiff should have been given an opportunity to rebut the facts which were the basis of the charge would exalt form over substance and obfuscate the clear fact that plaintiff's actions were improper and discipline of some sort was justified.

Given the concession as to the fact of the offense and plaintiff's culpability for it, the sole question before defendant Craig as the official administering discipline was the type of punishment the offense warranted. To this end, plaintiff and Dr. Craig had extended discussions concerning the character of the act and plaintiff's motivation for it over a period of several days after the device was confiscated in which defendant Craig inquired as to these factors. That these meetings were in private without transcript or other memorialization is not constitutionally impermissible. *Hagopian v. Knowlton, supra; Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 768 (W.D. La. 1968); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963).

Furthermore, we do not perceive that Dr. Craig was inherently biased as a decision maker by virtue of his position as a college administrator. *Winnick v. Manning, supra*, at 549. It may well be that having an administrator as the sole judge in student disciplinary proceedings is undesirable but this fact, standing alone, does not violate due process and no credible evidence of Dr. Craig's actual bias is before us. *Winnick v. Manning, supra*, at 348; *Simard v. Board of Education of Town of Groton*, 473 F.2d 988, 993 (2d Cir. 1973); *Murray v. West Baton Rouge School Board*, 472 F.2d 438, 443 (5th Cir. 1973). We point out that Dr. Craig acted only after the College judicial structure failed to act.

We recognize that a lengthy suspension is a severe penalty in an academic environment which necessitates stricter procedural safeguards. *Farrell v. Joel, supra*. However, given the circumstances that the offense and its commission by plaintiff were essentially uncontroverted, we believe that plaintiff received an

opportunity to be heard before the official having the authority to discipline him and thus had a say in the determination of the validity of the claim against him. Consequently, plaintiff was not deprived of procedural due process.

Defendant Craig clearly reached a decision as a result of the hearing that the offense was of such magnitude that if the device had dangerous propensities, plaintiff should be separated from the College. Plaintiff was informed of this decision and also was notified that the State's laboratory would examine the device. When defendant Barnet communicated the facts concerning the bomb to defendant Craig on February 11, 1971, all the operative factors supporting the suspension were complete and plaintiff was notified of his separation from the College. We believe that this factual sequence did not unfairly trample plaintiff's constitutional rights. Moreover, we are not prepared to say that the discipline meted out transcended acceptable limits or was arbitrarily or capriciously administered. *Buttny v. Smiley*, 281 F. Supp. 280, 289 (D. Colo. 1968). Thus, we render judgment in favor of defendant Craig.

We do not rest our decision solely on this basis, however. As a public officer exercising his discretion while performing his duties, defendant Craig possessed a qualified privilege precluding responsibility for performing his official duties if undertaken in good faith. *Curry v. Gillette*, 461 F.2d 1003, 1005 (6th Cir. 1972), *cert. denied, sub nom. Marsh v. Curry*, 409 U.S. 1042 (1972); *Donovan v. Rienbold*, 433 F.2d 738, 744 (9th Cir. 1970) *cf. Pierson v. Ray*, 386 U.S. 547 (1965). Dr. Craig acted in good faith in his relations with plaintiff and is thus insulated from liability under Section 1983. We also emphasize in this regard the dilemma faced by modern day educators who are being rapidly instructed in the subleties of constitutional law as it applies on the campus, often in an ex post facto manner. In a fast evolving area of legal doctrine where the applicable standards are being rapidly formulated on an ad hoc basis, we believe it is a great deal to ask college administrators acting in stressful times to exercise the duties of their office with unerring judg-

ment in the requirements of the law. This consideration weighs heavily in our determination that Craig acted in good faith.

We are considerably more troubled by Count III of plaintiff's complaint which alleges that certain aspects of one of Barnet's letters of February 11, 1971 to defendant Craig were libelous insofar as they pertained to plaintiff.[1] The remarks of defendant Barnet, other than as they pertained to the explosive potential of the device (which are not and clearly could not in any way be deemed libelous) in no way influenced defendant Craig in the carrying out of the decision which he had earlier made. To the extent that plaintiff's claim for damages for the alleged libel is dependent upon the fact of his ultimate suspension from College it must fail because of the lack of any correlation between the alleged libel by Barnet and plaintiff's suspension by Craig.

Defendant Barnet's communication of February 11, 1971 stated in part that "insofar as this office is concerned, the subject Breakstone is either mentally ill or possessed of such anti-social tendencies that his continued presence at a State College could constitute a risk of danger not only to state property but to human lives as well.[2] Vermont has apparently not decided whether it is actionable per se in a written publication to impute to another insanity or the impairment of mental facilities.[3] However, the weight of authority holds that such written statements are libelous per se.[4] *Goldwater v. Ginsburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir. 1949), *cert. denied*, 338 U.S. 858 (1949); *Totten v. Sun Printing & Pub. Assoc.*, 109 F. 289 (2d Cir. 1901); *Brauer v. Globe Newspaper Co.*, 351 Mass. 53, 217 N.E.2d 736 (1966); *Kenney v. Hatfield*, 351 Mich. 498, 88 N.W.2d 535 (1958); *Brunstein v. Almansi*, 71 N.Y.S.2d 802 (Sup. Ct. 1947), *aff'd*, 76 N.Y.S.2d 837, 237 App. Div. 809 (1947); *Berry v. Moench*, 8 Utah2d. 191, 331 P.2d 814 (1958).

After scrutinizing the position taken by the Vermont Supreme Court concerning libel and defamation, we conclude that Vermont would follow the law of the majority of those

jurisdictions which have decided this issue and we therefore hold that the remarks of defendant Barnet in his letter of February 11, 1971 were libelous per se.

Inherent in this holding is the finding that defendant Barnet's statement constituted malice in law or legal malice. Legal malice is presumed from a publication that is actionable per se. However, such a finding does not imply ill will, personal malice or a purpose to injure. 50 Am. Jr.2d Libel & Slander § 174. We have specifically concluded that defendant Barnet did not act with express malice in writing the letter to defendant Craig since the letter was not written with evil intent or with a positive desire to injure plaintiff.

Furthermore, we find that the statements made by Barnet about the plaintiff were factually incorrect and did not accurately characterize the plaintiff or his mental or emotional condition. Likewise there can be no dispute, and we so find, that the alleged defamation was "published" when the letter written by defendant Barnet was read by defendant Craig. Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed. 50 Am. Jr.2d Libel & Slander § 146; Restatement of Torts § 577. It is not necessary in matters of libel or slander that the defamation be made known to the public generally, or even to a considerable number of persons. It is sufficient if it is communicated to only one person other than the person defamed, even though he is enjoined to secrecy. 50 Am. Jr.2d Libel & Slander § 152.

Having found that defendant Barnet made libelous statements in his letter of February 11 which were published when they were read by defendant Craig, we must further determine whether defendant Barnet was nevertheless privileged to make them by virtue of his office as State's Attorney.

A threshold obstacle to the availability of this defense is defendant Barnet's failure to raise it in the pleadings. The specific inquiry in this regard is whether the failure to include this defense in any pleading constitutes its waiver. See *Strauss v. Douglas Aircraft*, 404 F.2d 1152 (2d Cir. 1968); *Badway v.*

United States, 367 F.2d 22 (1st Cir. 1966). Rule 8(c) Fed. R. Civ. P. requires that in "pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." In this case, plaintiff's amendment to the complaint containing the allegations of libel was allowed at the commencement of the hearing on the merits at which time defendant Barnet was permitted to orally respond and he did so, denying the allegations of the amended complaint. Assuming the defense of privilege is within the ambit of affirmative defenses which must be set forth under Rule 8(c), *White v. Chicago, B. and Q. R. R.*, 417 F.2d 941 (8th Cir. 1969), defendant Barnet is not foreclosed from relying on this defense because of the provisions of Rule 15(b), Fed. R. Civ. P. [5] Rule 15(b) is applicable to defenses as well as to claims for relief and, to the extent it applies, operates as an exception to the rule that affirmative defenses not pleaded are waived. *Saper v. Hague*, 186 F.2d 592, 594 (2d Cir. 1951); J. Moore, Federal Practice, Vol. 3, 15.3[2]. Since the issue of defendant Barnet's privilege was one of the issues tried before the court, and evidence was introduced thereon without objection, the parties impliedly consented to the treatment of the privilege issue as if it had been raised in the pleadings. *Lomartira v. American Automobile Ins. Co.*, 245 F. Supp. 124 (D. Conn. 1965), *aff'd*, 371 F.2d 550 (2d Cir. 1965); *Flowers v. Zayre Corp.*, 286 F. Supp. 119 (D.C.S.C. 1968). See also *Washington Annapolis Hotel Co. v. Riddle*, 171 F.2d 732 (D.C. Cir. 1948) where it was held that the defense of privilege in a libel action may be availed of under a general denial where the issue was tried by the implied consent of the parties. Indeed, Rule 15(b) is mandatory in its directive that issues tried by implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings. Furthermore, no formal or written application to amend defendant's answer to raise this defense is necessary.[6] *Lomartira v. American Automobile Ins. Co., supra; Decker v. Korth*, 219 F.2d 732 (9th Cir. 1955), *cert. denied, sub nom. Mullet v. Korth*, 350 U.S. 830 (1955).

We therefore hold that the defense of privilege is available to

defendant Barnet and need not, in the circumstances of this case, be affirmatively alleged.

The parties have dealt extensively with the question whether defendant Barnet, by virtue of his office as State's Attorney, enjoyed prosecutorial immunity from suit in this matter, and predictably have reached opposite conclusions. We do not decide this issue, preferring instead to resolve the matter by determining whether defendant Barnet was privileged in making these statements by virtue of his office. Thus, we necessarily assume, without deciding, that Barnet's actions in this case do not render him immune from civil suit on grounds that he was performing his quasi-judicial duties as a prosecutor.

The law of Vermont governs the disposition of the issue of privilege because the libelous statements were made within the state. *DeRonde v. Gaytime Shops, Inc.*, 239 F.2d 735, 738 (2d Cir. 1956).

Vermont precedent is not dispositive of the issue of defendant Barnet's privilege although it is helpful to some degree. Under Vermont law defamatory statements made in the course of judicial proceedings,[7] remarks made by a juror during deliberations[8] and statements, whether true or false, to the state legislature or any of its members, contained in a petition for redress of grievances,[9] are all protected by an absolute privilege.[10]

Whether the statements made by defendant Barnet in his letter of February 11, 1971 to defendant Craig are protected by an absolute privilege is a difficult question to answer on the strength of the decided cases which we have examined. The statements made by Barnet were his conclusions as to the mental condition or personality of the plaintiff unsolicited by defendant Craig and in that sense were voluntarily expressed by him. They had no direct connection with any judicial proceeding pending or subsequently to be brought. In this connection, we conclude that defendant Barnet's subsequent prosecution of the plaintiff for violation of the fireworks statute was in no way related or connected with the statements which he wrote to defendant Craig.[11]

Since there is no Vermont case on the subject, we are free to adopt the view that the Supreme Court of Vermont most likely would adopt if called upon to rule on this point. We believe that the view most consonant with Vermont's principles of libel and privilege is found in the line of cases in the federal courts dealing with the privilege accorded to federal officials. Under the federal doctrine, statements by federal officers and employees are absolutely privileged if made within the "outer perimeter" of their line of duty. *Barr v. Matteo*, 360 U.S. 564, 575 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959); *West v. Garrett*, 392 F.2d 543 (5th Cir. 1968). See also *Frommhagen v. Glazer*, 442 F.2d 338 (9th Cir. 1971), *cert. denied*, 404 U.S. 1038 (1972), where the test of absolute privilege was whether the person sought to be charged with libel was acting under "color of [his] office" in writing and circulating the libelous document.

Under the rule of *Barr v. Matteo, supra*, absolute privilege is not an attribute of the defendant's particular title or rank of office. The test of privilege is the relationship between the act or conduct complained of and the matters committed to the official's control and supervision. *Barr v. Matteo, supra*, at 573-74; *Sauber v. Gliedman*, 283 F.2d 941, 943 (7th Cir. 1960), *cert. denied*, 366 U.S. 906 (1961). A libelous statement is absolutely privileged where the nature of the official's duties requires that he be immune from private tort liability in order to further the effective functioning of government. The rule of privilege, then, is not founded on the need of the individual officer but on the public need for the performance of public duties free from threat of retaliation for injury committed in the course of duty. *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969).

Since privilege is directly dependent upon the scope of the power and discretion entrusted to the officer, it is necessary to assess the extent of the State's Attorney's authority in order to determine if defendant Barnet's conduct transcended its outer perimeters.

The duties of State's Attorneys are set forth in 24 V.S.A. § 361 (1969), as amended.[12] It does not follow, however, that the

outer boundaries of a State's Attorney's duties are delimited by the narrow scope of the statute and all other actions undertaken by a state's attorney for the protection and benefit of the public exceed his authority because they are not statutorily enumerated.

In this connection, we note that the Attorney General of Vermont has ruled that the duties and responsibilities of the State's attorneys are not limited to only criminal matters referred to in the statute. 1964-66 Att'y. Gen. Op. 315. In fact, it would be most difficult to argue that in contemporary society crime prevention, protection of the citizenery from criminally induced harm and control of potentially dangerous situations are outside the purview of the office of State's Attorney even though such activities are not directly involved with the prosecution of criminal offenses nor specifically enumerated by statute. Indeed, a state's attorney who did not consider or attempt to cope with illegal situations which might result in harm to the public before they developed might well be considered derelict in his duty. Although our conclusion is not an easy one, we conceive that defendant Barnet, in advising defendant as he did in his letter of February 11, 1971 acted within the perimeters of his official duties and therefore had an absolute privilege to make the statements concerning plaintiff. We also note that defendant Barnet's comments, although gratuitous, were contained in a response to an inquiry from defendant Craig and Barnet's answer to the inquiry was clearly within his line of duty. Furthermore, Barnet's office had undertaken an investigation of plaintiff and therefore he was not totally ignorant of plaintiff's character. Finally, the libelous publication was directed solely to a person whom defendant could reasonably have believed would be in a position to take remedial action to protect the public interest and this would have been for the ultimate benefit of the community in which defendant Barnet served as State's Attorney. Indeed, the very sentence in which the libelous statement is contained evidences Barnet's sincere concern for the welfare of the state and its citizens. We con-

clude that Barnet's conduct was done under color of his office and within his line of duty.

We do not rest our opinion solely on our belief that an absolute privilege attached to defendant Barnet because we believe that defendant Barnet also had immunity by virtue of a qualified privilege. A qualifiedly privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right of interest. See *Fleck Bros. v. Sullivan*, 423 F.2d 155 (7th Cir. 1970); *Hern v. Hattinger*, 303 F.2d 333 (2d Cir. 1962); *Marsh v. Commercial and Savings Bank of Virginia*, 265 F. Supp. 614 (W.D. Va. 1967).

Both defendants Barnet and Craig clearly had an interest in the plaintiff's status, conduct and activities on the Johnson State College campus and, since Barnet's publication was for the purpose of protecting the State's property and the public safety and was directed toward a person sharing a common interest, it was made on a privileged occasion. 50 Am. Jur.2d Libel & Slander § 196.

The statement contained in the February 11, 1971 letter, although considered by Craig to be gratuitous and unnecessary, nonetheless was limited in its scope to a characterization of the plaintiff by defendant Barnet in the light of the particular incident involving the explosive device. Made without actual malice, it was offered in connection with what defendant Barnet conceived to be a grave situation exposing the citizens of Lamoille County and the students of Johnson College to potential harm if plaintiff continued to be involved in activities of a similar nature. Defendant Barnet's publication of the libel solely to defendant Craig in a letter addressed to the latter's attention is consonant with a privileged communication. And, although we have some hesitation in reaching this conclusion, we believe on balance that the circumstances fairly warranted the com-

munication. Consequently, the sole remaining consideration is whether defendant Barnet acted in good faith.

We cannot concur with plaintiff that defendant Barnet was acting in other than good faith or other than in the interests of his office in characterizing the plaintiff as he did in the letter of February 11 to defendant Craig. We have found as a fact that this characterization was in error but we are convinced that his statement reflected his honest belief as to the reasons which motivated plaintiff to construct and attempt to detonate an explosive device.

We believe defendant Barnet to be a conscientious and dedicated public servant. If anything, he was excessively zealous in seeking to fulfill the obligations to society imposed by his office as he believes them to be. We neither commend or condemn defendant Barnet for the manner in which he handled this matter but we can not fault him for endeavoring to carry out the functions required of a State's Attorney in the manner he felt indicated in light of the events as he understood them. The nature of the office of State's Attorney demanded that he take an interest in the matter involving the plaintiff and pursue it vigorously. The actions which he undertook were done in the faithful discharge of his duties as a public officer. We perceive no intent or purpose to damage plaintiff's reputation or standing in the community. Barnet bore no particular ill will toward plaintiff but rather was legitimately concerned by the nature of the conduct exhibited by plaintiff. That some more reasonable manner of exhibiting this concern was available to Barnet we believe is apparent but, after analyzing all the facts, we conclude that his conduct was protected by a qualified privilege and we so hold.

The decision in *McDowell v. Texas Board of Mental Health and Mental Retardation*, 465 F.2d 1342 (5th Cir. 1971), *cert. denied*, 410 U.S. 943 (1973) is much in point and, although involving slander rather than libel, the parallel with the instant case is marked. The plaintiff in *McDowell*, was employed by the Texas Board of Mental Health and Retardation and was summarily discharged as superintendent of a state mental health

facility after twenty-two months service. In addition to his federal cause of action with regard to his discharge which alleged a denial of substantive and procedural due process, McDowell sued two board officials and a private party under a pendant state claim of slander. The court held that the statements made by the individual defendant were slanderous per se but they were nevertheless qualifiedly privileged under the following test:

> A qualified privilege attaches to statements which occur under circumstances wherein any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist which another, sharing that common interest, is entitled to know.

The court observed that had the plaintiff been able to establish actual malice toward him the privilege would be unavailable to the defendant but the record was barren of any such evidence.

In the case before us we have found that defendant Barnet was not activated by actual malice in making the statements which the plaintiff found offensive in the February 11, 1971 letter and, though libelous per se, they are afforded the protection of qualified privilege.

Accordingly, we find that defendant Barnet was privileged both absolutely and conditionally in expressing his unsolicited thoughts to defendant Craig. Thus, the circumstances of this case provided Barnet with the right to express his opinions and make recommendations to defendant Craig free from the fear that he would be held to respond in damages for so making them.

This opinion constitutes our conclusions of law under Rule 52(a), Fed. R. Civ. P.

WHEREFORE, judgment is entered on behalf of all defendants.

Dated at Burlington in the District of Vermont, this 12th day of September, 1973.

Albert W. Coffrin
District Judge

FOOTNOTES

1 We disagree with plaintiff's contention that the portion of the letter which he claims was false, defamatory and libelous in any way caused or resulted in his suspension as a student at Johnson State College or affected his status at the College. As we have previously noted, the decision that if the device was found to have explosive characteristics the plaintiff would be suspended had long before been made by defendant Craig and imparted to the plaintiff.

2 The letter in its entirety reads as follows:

February 11, 1971

Dr. William G. Craig
President, Johnson State College
Johnson, Vermont 05656

Dear Dr. Craig:

In further reference to the Breakstone case, please be advised that the pipe-shaped object found in his possession has been determined to be an explosive device containing a sufficient amount of explosive matter to cause material damage to people or property in its proximity when and if it would have been detonated.

As far as this office is concerned, the subject Breakstone is either mentally ill or possessed of such anti-social tendencies that his continued presence at a state college could constitute a risk of danger not only to state property but also to human lives as well.

Sincerely,

s/Ted

Theodore R. Barnett
State's Attorney

TRB:dm

cc: Dean Ralph Monticello, JSC

3 We hold that the terminology of mental illness and anti-social tendencies denotes or is sufficiently akin to insanity to be indistinguishable for purposes of this opinion.

4 A publication that is libelous *per se* obviates the necessity for pleading and proving special damages. *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 367 F.2d 625, 628-29 (3d Cir. 1966).

5 Rule 15(b) Fed. R. Civ. P. provides in pertinent part that:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party, at any time, even after judgment, but failure to so amend does not affect the result of the trial of these issues.

6 Had we found a formal declaration necessary in order for the defense of privilege to be raised by defendant Barnet, we would have called this fact to the attention of counsel and permitted an amendment to his answer. In fact, we would permit such an amendment even at this late date if we deemed it necessary to properly frame the issue.

7 *Mower v. Watson*, 11 Vt. 536, 540 (1839); *Torrey v. Field*, 10 Vt. 353, 414 (1838).

8 *Dunham v. Powers*, 42 Vt. 1, (1869).

9 *Harris v. Huntington*, 2 Tyler 129, 146 (1802).

10 An absolutely privileged communication is one in respect of which, by reason of the occasion on which, or the matter in reference to which, it is made, no remedy can be had in a civil action, however hard it may bear upon a person who claims to be injured thereby, and even though it may have been made maliciously and is false. The privilege is a matter of public policy, and is not intended so much for the protection of those engaged in the public service in the enactment and administration of law, as for the promotion of the public welfare so that persons to whom the privilege is extended may speak their minds freely and exercise their respective functions without incurring the risk of a criminal prosecution or a civil action for the recovery of damages. 50 Am. Jur.2d Libel & Slander § 193.

11 Plaintiff presented evidence that at the prosecution for violation of the fireworks statute defendant Barnet discussed with plaintiff's attorney the need for psychiatric treatment of the plaintiff and also recommended to the presiding judge that a plea of not guilty by reason of insanity should be entered on the plaintiff's behalf and he should be referred for a psychiatric examination. We do not understand that the plaintiff claims anything for this evidence other than as it may demonstrate the underlying and continuing attitude of defendant Barnet toward the plaintiff and as having some bearing on the issues of motive and intent in writing to defendant Craig in the manner in which he did. Had the plaintiff made a claim that he had a cause of action for these representations by defendant Barnet made at and in connection with the criminal prosecution for violation of the fireworks statute we would determine that Barnet enjoyed an absolute privilege in making such statements in connection with judicial proceedings as well as prosecutorial immunity from suit as having been made in connection with his quasi-judicial duties. *Woodmansee v. Costello*, No. 6739 (D. Vt. May 23, 1973); *Pokdor v. McAuley*, 130 Vt. 173, 287 A.2d 841 (1972).

12 A state's attorney shall prosecute for offenses committed within his county, and all matters and causes cognizable by the supreme, county and district courts in behalf of the state; file informations and prepare bills of indictment, deliver executions in favor of the state to an officer for collection immediately after final judgment, taking duplicate receipts therefor one of which shall be sent to the finance director, and take measures to collect fines and other demands or sums of money due to the state or county.

12 V.S.A. § 361 (1969).

STATE OF VERMONT
OFFICE OF THE STATE'S ATTORNEY
LAMOILLE COUNTY
Hyde Park, Vermont 05655

December 21, 1970

Dr. William G. Craig
President, Johnson State College
Johnson, Vermont 05656

Re: Student Bomb

Dear Dr. Craig:

This matter is presently being investigated by the Bureau of Criminal Investigation of the Vermont State Police.

As soon as we have something more to report, rest assured that we shall be in touch with you.

In the meantime, to protect the other students in Arthur Hall against possible serious personal injury, we suggest that you give consideration to moving the suspect to some place where his activities are less likely to cause harm and anxiety.

Yours truly,

Theodore R. Barnett
State's Attorney

TRB:dm

STATE OF VERMONT
OFICE OF THE STATE'S ATTORNEY
LAMOILLE COUNTY
Hyde Park, Vermont 05655

January 27, 1971

Dr. William G. Craig
President, Johnson State College
Johnson, Vermont 05656

Re: Explosive device found in dorm

Dear Sir:

We have finally received word from the state police laboratory that the pipe-shaped article found in Arthur Hall in the room of Joel Breakstone has been determined to be explosive in nature.

I have authorized the state police to use some of the material in field testing to determine what the explosive force of the device would have been.

In the meantime, I would most earnestly recommend that the possessor of the bomb, Joel Breakstone, be expelled from school forthwith and that all state colleges are notified of your action. My office will endeavor to bring criminal charges against Breakstone if we can find a statute which covers this offense.

I have deliberately refrained from releasing any news of this incident to the newspapers, not only to avoid possible embarrassment to the college administration, but also to avoid giving left-wing students any inspiration.

Sincerely,

Theodore R. Barnett
State's Attorney

TRB:dm
CC: Dean Ralph Monticello, Johnson State College

STATE OF VERMONT
OFFICE OF THE STATE'S ATTORNEY
LAMOILLE COUNTY
Hyde Park, Vermont 05655

February 11, 1971

Dr. William G. Craig
President, Johnson State College
Johnson, Vermont 05656

PERSONAL

Dear Dr. Craig:

As the bomb problem may very well come up in another state college, I hope you have communicated our mutual concern to Dr. Babcock so that appropriate guidelines can be laid down to cope with such a situation in the future. I wonder if you could confirm to me in writing that you have done this.

As far as Johnson State College is concerned, both this office and the State Police were shocked at the failure of your administration to report the bomb as soon as it was discovered. On top of that, the taking of the bomb to a college chemist to perform experiments on it constitutes a tampering with evidence which might well have served as an essential link at the prosecution of a dangerous individual. As you probably know, once evidence has been tampered with it is virtually useless from that point on as far as prosecution is concerned. Also, by turning the device over to someone else on the campus, your administration ran the risk of being involved in culpability in case the device had detonated while it was being taken apart.

I do not wish to unduly alarm you, but this could have been a most unfortunate affair.

Sincerely,

Theodore R. Barnett
State's Attorney

TRB:dm
CC: Dean Ralph Monticello, JSC

STATE OF VERMONT
OFFICE OF THE STATE'S ATTORNEY
LAMOILLE COUNTY
Hyde Park, Vermont 05655

February 11, 1971

Dr. William G. Craig
President, Johnson State College
Johnson, Vermont 05656

Dear Dr. Craig:

In further reference to the Breakstone case, please be advised that the pipe-shaped object found in his possession has been determined to be an explosive device containing a sufficient amount of explosive matter to cause material damage to people or property in its proximity when and if it would have been detonated.

As far as this office is concerned, the subject Breakstone is either mentally ill or possessed of such anti-social tendencies that his continued presence at a state college could constitute a risk of danger not only to state property but also to human lives as well.

Sincerely,

Theodore R. Barnett
State's Attorney

TRB:dm
CC: Dean Ralph Monticello, JSC